U.S. Department of Labor

Office of Administrative Law Judges
William S. Moorhead Federal Office Building
1000 Liberty Avenue, Suite 1800
Pittsburgh, PA 15222

(412) 644-5754
(412) 644-5005 (FAX)

Issue Date: 19 February 2009

CASE NO. 2008-STA-39

In the Matter of:

PETER SPELSON,
Complainant

v.

UNITED EXPRESS SYSTEMS and PML,
Respondents

APPEARANCES:

Laurel Hickman, Esq.,
For the Complainant

Bernard K. Weiler, Esq.,
For the Respondents

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

I. JURISDICTION

This proceeding arises under the "whistleblower" employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 [hereinafter "the Act" or "STAA"], 49 U.S.C. § 31105 (formerly 49 U.S.C. app. § 2305), and the applicable regulations at 29 C.F.R. Part 1978. The Act protects employees who report violations of commercial motor vehicle safety rules or who refuse to operate vehicles in violation of those rules.

II. PROCEDURAL HISTORY[1]

Complainant, Mr. Peter Spelson (hereinafter "Spelson"), filed a complaint of discrimination with the Department of Labor, under Section 405 of the Act, against United Express Systems (hereinafter "United Express," "United" or "UES") and PML, on or about August 1, 2007, alleging he was discharged by the respondents, United Express Systems and PML, in retaliation for making safety complaints concerning United Express' trucks. The complaint was investigated by the Department of Labor and found to have not established a nexus between the alleged protected activities and the dismissal. On February 13, 2008, the Secretary issued her Findings dismissing the complaint. By letter, dated March 13, 2008, Mr. Spelson timely objected to the Secretary's Findings and requested a hearing. I issued a Notice of Hearing, on April 2, 2008. The matter was tried, November 5-7, 2008, in Wheaton, Illinois, and in Chicago, Illinois. The complaint presents the issue of whether Mr. Spelson was discharged in violation of the STAA. A post-hearing brief was filed on behalf of United Express Systems, on January 28, 2009. Mr. Spelson did not submit a brief.

III. STIPULATIONS AND THE PARTIES' CONTENTIONS

A. Stipulations

The parties agreed to, and I accepted, the following stipulations of fact (TR 30-41):

1. The respondent is a motor carrier engaged in commercial motor vehicle operations which maintains a place of business in Aurora, Illinois.

2. The respondent's employees operate commercial motor vehicles, in the regular course of business, over interstate highways and connecting routes, principally as an expedited trucking and cartage service.

3. Respondent, PML, is a human resources management company providing benefit and payroll services for United Express.

4. United Express employees are hired as PML co-employees.

5. United Express controls the hiring and day-to-day management of employees and is responsible for the training and discipline of its personnel.

6. The respondents are and were "persons," as defined in the STAA, 49 U.S.C. § 31101(3).

[1] References in the test are as follows: "ALJX__" refers to the administrative law judge or procedural exhibits received after referral of the case to the Office of Administrative Law Judges; "CX__" refers to complainant's exhibits; "RX__" to respondent's exhibits; and "TR__" to the transcript of proceedings page and testifying witness' names.

7. The complainant was hired as a as a driver-employee of the respondent, on or about May 2, 2007.

8. All United Express drivers are hired with an initial 90-day introductory period.

9. Respondent, United Express, maintains a fleet of fourteen vehicles, including five straight trucks with up to 25,950 pounds gross vehicle weight ratings, five cube vans with 10,000 to 12,000 pounds gross vehicle weight ratings, and three semi-tractors.

10. The complainant worked as a driver of a commercial delivery vehicle with a gross weight in excess of 10,000 pounds used on the highways.

11. The complainant's employment with Respondent ended, on or about July 5, 2007.

12. During the period of his employment, the complainant filed driver vehicle condition reports ("DVCRs") about:

On June 18 2007-a lift-gate malfunction on truck #10.
On June 19, 2007-reverse lights not functioning, reverse gear and side mirrors and brackets misaligned, engine noise, and coolant level, truck #9.
On June 20, 2007- difficult to operate truck bed door, parking brake not holding, brake peddle vibrations and malfunction, truck #7.
July 2, 2007- truck no. 79 dirty and oil residue having sprayed near where the oil is checked.

13. On or about August 1, 2007, the complainant filed a complaint with the Department of Labor, Occupational Safety and Health Administration ("OSHA"), under the provisions of the STAA.

14. On or about June 15, 2007, the OSHA Area Director issued "Secretary's Findings" concluding Mr. Spelson had not established a nexus between the alleged protected activities and his dismissal.

15. The complainant had not, on or before August 1, 2007, commenced or cause to be commenced, a proceeding under the STAA, had not and was not about to testify in a proceeding under the STAA, and had not or was not about to participate in any proceeding under the STAA.

B. The Parties' Contentions:

1. *Complainant*:

The complainant argues that the driver vehicle condition reports and oral reports he provided United Express Systems, during his work as a truck driver, constituted protected activity covered by the STAA. As a result of his protected activities, he argues United Express Systems terminated him, on or about July 5, 2007. Spelson contends that a driver engages in

protected activity under the STAA when he files safety complaints and/or refuses to drive due to unsafe conditions.

2. *Respondent*:

United Express Systems does not agree that the complainant engaged in protected activity or that he was discharged for an impermissible reason. United Express Systems argues that the complainant was terminated for gross insubordination, a June 29, 2007 inordinately late delivery, unacceptable behavior at customer Distinctive Wine's facility, and for having his communication device turned off, contrary to company rules, resulting in management's inability to contact him on the job. Further, United Express Systems contends that the termination of Mr. Spelson is simply a management matter which does not run afoul of the STAA. It argues that it disciplined and/or discharged Spelson for legitimate, non-discriminatory, reasons.

IV. ISSUES

A. Whether, under 49 U.S.C. § 31105(a)(1)(a), the respondent discharged, disciplined or discriminated against an employee, to wit the complainant, regarding pay, terms or privileges of employment, because,

> He had filed complaints related to a violation of a commercial motor vehicle safety regulation, standard, or order, or

B. Whether, under 49 U.S.C. § 31105(a)(1)(b)(i), the respondent discharged, disciplined or discriminated against an employee, to wit the complainant, regarding pay, terms or privileges of employment, because,

> He refused to operate a vehicle, on or about July 5, 2007, because its operation would have violated a regulation, standard, or order of the United States related to commercial motor vehicle safety or health or,
>
> He refused to operate a vehicle because he had a reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition?[2]

C. If the respondent so violated 49 U.S.C. § 31105, what are the appropriate sanctions or damages?

V. PRELIMINARY FACTS

The complainant was hired as an employee of the respondent commercial motor carrier, on or about May 2, 2007. Thereafter, complainant worked as a driver of a commercial motor vehicle for United Express Systems until he was discharged, on or about July 5, 2007.

[2] The respondent challenged whether the complainant had raised a "refusal to drive" issue. (TR 23). In violation of my directive, the complainant's counsel did not file a pre-hearing report setting forth contested issues. (TR 24).

Mr. Spelson worked at United Express Systems' Aurora, Illinois, facility. During his employment with United Express he operated delivery trucks and routinely prepared pre-trip inspection reports, manifests, and driver vehicle condition reports.

The parties do not dispute the fact that occasionally United Express' trucks, like any other vehicles, had items which required repair and that Spelson reported them. The evidence establishes United Express had an excellent safety record, took good care of its trucks, serviced them regularly, and did not allow trucks with serious safety defects to operate.

There being adequate support in the record for the parties stipulations in Paragraph IIIA herein, those stipulations are hereby incorporated by reference into Paragraph VI as Findings of Fact and Conclusions of Law, as if fully set forth.

VI. DISCUSSION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact and Law

The United Express Systems of Aurora, Illinois, is a small transportation, delivery and warehousing business founded in 1985. Mr. Brad Westrom, owner and president, had served as an Aurora fireman for over thirty years and rose to the rank of battalion chief before he retired. When United was founded and for some time thereafter, Mr. Westrom performed all the job duties himself. United now employs about 33-34 employees, including twelve drivers. It also owns Chicago Delivery, Inc., a collocated independent delivery contractor with about 85 independent contractor drivers. United owns 10-13 used trucks, i.e., cube trucks, straight trucks, and tractor trailers, which were purchased with only one to two years prior use. It has a vehicle maintenance supervisor (Mr. Lentz) and a vigorous safety and maintenance program. It has an undisputed twenty-two year, excellent, safety record.

United's Employee Handbook, a copy of which was given all new employees, including the complainant, states that all employees are "at will" employees. (CX 4, page 7; RX 9 and 10). New employees serve an "introductory" period for their first 90 days. (CX 4, page 4). United has a four-step, "progressive" discipline program, i.e., verbal warning, written warning, suspension, and termination, where appropriate. (CX 4, page 15). However, as Mr. Rennels (PML human resources) testified, steps may be skipped. United's "insubordination" policy provides for immediate termination, among other possibilities. (RX 17; CX 4, page 16). In the previous eight years, no employee had been terminated for gross insubordination.

The Handbook advises that the following conduct is considered "inappropriate": "Fighting or using obscene, abusive or threatening language or gestures." Employees are informed that if their "performance, work habits, overall attitude, conduct or demeanor become unsatisfactory based on violations either of the above or of any other Company policies, rules or regulations the employee will be subject to disciplinary action up to and including discharge." (CX 4, page 15). Employees may be immediately terminated for "threatening or intimidating behavior or acts of violence or … any obscene, abrasive or threatening gestures or language, verbal or written…" (CX 4, page 16). The Handbook, in addition to stating that employees must report vehicle malfunctions and unsafe or hazardous conditions, also states, "[D]aily checks must

be made of all safety equipment, fluids, and a pre-trip inspection (in accordance with FHWA regulations) must be conducted." (RX 1; CX 4, pages 33-34). The exceedingly thorough Handbook does not mention STAA protections.

Respondent, PML Holdings Group, Inc., is a human resources management company providing benefit and payroll services for United Express. United Express employees are hired as PML co-employees. (RX 12). United Express controls the hiring and day-to-day management of employees and is responsible for the training and discipline of its personnel.

Mr. Westrom, whom I found to be very candid and credible, testified that as a former fire-fighter, his "ultimate concern" was safety. He carried this concern into running United. He serves on the Board of Directors of the Illinois Trucking Association, an arm of the American Trucking Association, which deals with safety matters. He testified that United has never had a major injury incident. Mr. Westrom testified that "(he) cares very deeply for everyone who works for us." He specifically hired Terry Lentz as a safety and fleet maintenance manager. The company has three annual safety meetings and posts safety posters. It is "mandatory" for drivers to immediately report vehicle defects. United requires drivers to prepare driver vehicle condition reports ("DVCR"), like RX 2, daily or for each truck, at least monthly. It is not a Department of Transportation ("DOT") requirement, but rather United's means to keep up with its vehicle maintenance. Mr. Westrom "loves people using the DVCRs" and it is not viewed as a "complaint." On the other hand, the DOT does require a "manifest." Moreover, drivers are also required to perform a pre-trip and post-trip vehicle inspection. Those checks are reflected on the manifest checklist. (RX 3). Admittedly, trucks break or need repair and United is always fixing them. No driver has ever been disciplined for submitting a DVCR. Mr. Spelson was never disciplined for submitting DVCRs. In fact, Mr. Westrom was not familiar with several DVCRs he had submitted until the hearing arose. Mr. Westrom added that a failure to report vehicle defects can cause many problems, such as increased insurance premiums, and DOT enforcement actions which could take trucks out of service.

Mr. Westrom testified that United has a strict, comprehensive, vehicle service program, following manufacturer recommendations for every vehicle. A distinct file is maintained for each truck. Vehicles reported to be "unsafe" are taken out of service. Drivers are not ever required to drive unsafe vehicles or vehicles with cracked mirrors; United dispatchers know that.

Vehicle maintenance supervisor, Mr. Terry Lentz, testified that his "primary" job is to ensure United's trucks are in safe condition. He is responsible for correcting any defects. If a defect was found, drivers were to inform "dispatch" or him or file a vehicle maintenance report. Mr. Lentz personally examined driver's daily manifests and personally inspected and repaired reported defects or had the truck taken to the repair shop. If it involved a "hazardous" condition, the truck would be removed from service and towed (to the repair shop), if necessary. Mr. Lentz trained new drivers, including Mr. Spelson, on inspections and defect reporting. "Off-site" repairs are accomplished by Dale Bohn's shop. Dale would also come to United's facility, with parts, if needed. Mr. Lentz, testified he got one to two DVCRs from drivers per week; he "encouraged" it. In his twelve years with United, he had never known of anyone being "threatened" for having raised a vehicle defect. He added that other drivers, who had submitted multiple DVCRs were never disciplined and remain employed with United.

Mr. Dale Bohn is a partner-owner of Northlake Auto Repair. United has been his customer over fifteen years. He works on one to two of their trucks each week and is very familiar with its fleet. United maintained a computer program for vehicle servicing and sent trucks to him with "to do" lists. Mr. Bohn would also inspect the trucks and fix defects; something United never said "no" too. When a major defect was reported United would send along the DVCRs. Since they were an important client United received priority service; a (perk) it took advantage of. He believed United's vehicles were in generally "pretty good" shape.

The record is filled with a number of Mr. Spelson's specific complaints reflecting his efforts to establish that he was fired for making "safety" complaints. He admitted no one at United said anything about his DVCRs until July 5th. Mr. Spelson testified that sometimes he did not write the DVCRs on the day he drove the truck and would submit them later.

On June 18, 2007, Mr. Spelson reported truck 10 had a broken lift gate on his delivery manifest. (RX 3). He added that after his last stop "guys down the street helped" and he had to use rope to hold it up. He testified that it had dragged on the street. He testified the gate was then chained and remained chained until his termination. He admitted he drove truck 10, on July 2, and noted no problems on the manifest. (RX 8). When Mr. Westrom learned of the broken gate, he and a mechanic looked at it, saw it was tied with rope and chained it closed, as a back-up safety measure. The lift gate mechanical locking device was working. Mr. Lentz testified that he was made aware of the gate problem and ordered its repair. Mr. Bohn testified that lift gates "go down" frequently and he must have fixed it. He added that chaining it shut was a temporary fix to prevent its use until it was repaired.

On June 19, 2007, Mr. Spelson reported the following about truck 9: reverse lights not functioning, reverse gear and side mirrors and brackets misaligned, engine noise, and coolant level. He noted the coolant was low and it needed a new air filter. Mr. Bohn subsequently repaired a switch which had "come unplugged" resolving the reverse light issue. Mr. Spelson testified that the mirrors were bent and loose so he could not see traffic behind. He added that the mirrors were never entirely fixed. Mr. Westrom testified that he inspected the truck and found no "broken" mirrors; he did, however, tighten and adjust the brackets. He does not permit the trucks to go out with broken mirrors. Mr. Westrom candidly testified that Mr. Spelson had complained about the trucks. Mr. Lentz found no broken mirrors. Mr. Westrom did not believe the engine sounds were out of the ordinary, nor did Mr. Lentz.. Mr. Lentz sent the truck to Mr. Bohn that day for service. Mr. Bohn plugged in the reverse lights switch which corrected the problem. The truck was returned to service the same day.

On June 20, 2007, Mr. Spelson reported the following about truck 7: difficult to operate truck bed door, parking brake not holding, brake peddle vibrations and malfunction. Mr. Spelson testified that he did not remember whether he prepared the DVCR before or after the trip. He said that the brakes seemed to shake with a longer stopping distance. He nevertheless drove it. Mr. Spelson believed the door problem made it difficult to open and could injure someone trying to open it. The pre-trip inspection, on the manifest he prepared that day (RX 14), did not reflect those defects. Although it was a "little difficult" to operate, Mr. Lentz was able to operate the bed door, even with his bad back. He and Mr. Bohn thought it was okay. Mr. Lentz believed the

parking brake, which can be affected by the truck's load, was "borderline" and sent it to Mr. Bohn for service. It was fixed and returned to service the same day.

On July 2, 2007, Mr. Spelson reported the following about truck 79: dirty and oil residue having sprayed near where the oil is checked. He admitted it was possible he had not driven no. 79 that day. Mr. Lentz testified that he did not recall any oil spray because that would have been a big problem, meaning the oil cap might be off. Mr. Bohn testified the truck (10) United's newest one and it had never had an oil leak or oil spraying; there would be no mist. Mr. Westrom testified that United has a contract with Fleet Wash for regular, periodic truck cleaning. (RX 15). In the summer, trucks are washed once a month and twice a month in the winter.

On July 5, 2007, Mr. Spelson testified he selected a truck he preferred (#10) and wanted to "pre-trip" it. It was going to be a slow day, he thought, because there was no work schedule. The dispatcher, Brian Lhotka, "hinted" that he might have to drive another truck, i.e., a larger straight truck, that the former would assign. He thought the truck that might be assigned had broken mirrors and said he would therefore not drive it. Mr. Spelson told Brian he was not a boss or supervisor. Mr. Spelson admitted it "devolved into an argument," without yelling. He admitted he was frustrated at the "injustice" and that his voice was up decibels but not enough to pierce a concrete wall. He had seen more senior drivers get their choice of trucks. Mr. Spelson told the dispatcher to "shut up" and take it up with management. He believed the dispatcher had no authority over him. When Ms. Chase, the general manager, informed him the dispatcher was a supervisor whom he must listen too, he responded that he had been unaware of that. The Employee Handbook lists dispatchers as "supervisory or management" personnel. (CX 4, page 10). Mr. Spelson testified that he raised his DVCRs with Ms. Chase at the time, but she ignored that and did not address them. He also testified that he told her the trucks were defective and required repair and that he would not drive defective trucks and get stopped. Mr. Spelson admitted he was never assigned a truck or any work on July 5th. He also admitted he had a poor relationship with Brian.

Mr. Spelson admitted that United had spoken to him about his radio (phone) use and a late delivery. RX 13 depicts a cell phone similar to the one United had issued him. Mr. Spelson was warned by Ms. Chase, about being out of contact with United while out on a route, on June 20, 2007. He said the phone mobile charger was not working and the phone had a low battery; so he turned it off when not using it contrary to the dispatcher's explicit instructions. Although Mr. Spelson had signed in at 7:00-7:15 AM, he did not return until 11:00 PM. The dispatcher and Ms. Chase were concerned whether the delivery had been made and whether Mr. Spelson and the truck were okay since his last delivery was at 3:15 PM and only 30-35 miles from the office. When Mr. Spelson pointed out the problem, Ms. Chase informed him United had plenty of extra chargers and that he should have phoned in. Mr. Spelson's excuse for not phoning was his claim not to know United's telephone number. After Ms. Chase admonished him, Mr. Spelson commented that United's equipment, i.e., chargers and trucks were "crap" and shoddy. But, Ms. Chase testified that those comments had nothing to do with her admonishment. Moreover, Ms. Chase testified she does very few verbal warnings although she had previously fired people. Mr. Spelson testified he had not charged the phone at home, with the company-issued charger, due to fatigue.

Ms. Chase was concerned about Mr. Spelson's late Bowling Brook delivery, on June 29, 2007. He had reported for duty at 9:00 AM. The "time-sensitive" delivery was scheduled for 11:00 AM. The customer called at 11:00 asking where the delivery was. When dispatch checked the truck's GPS location, Mr. Spelson was found going the wrong way on I-355. Dispatch contacted him with directions. It took twice as long to make the delivery as it should have. All of United's trucks have detailed maps. She informed Mr. Westrom of the matter. Ms. Chase, Mr. Rennels, Mike, and he had a conversation about how to deal with Mr. Spelson, i.e., training. Mr. Westrom believed this incident reflected one of the "most blatant under achievements" he had ever seen. Mr. Spelson's weekly time sheet, for 6/17-6/23, 2007, reflected some (unexplained) "exorbitant" hours compared to other drivers. Mr. Westrom opined that Mr. Spelson was costing United a tremendous amount of money. In early June, Mr. Westrom had personally trained Mr. Spelson on planning out his trips and using maps found in the trucks. The manifest (RX 8) prepared by Mr. Spelson illustrates use of the method he had suggested. Mr. Spelson testified he did not recognize Mr. Westrom (who was in the courtroom) and that Mr. Westrom had never met with him about organizing his routes.

Ms. Chase testified that Brian, the "lead" dispatcher, contacted her, on July 5, 2007, over a problem with Mr. Spelson. Brian did not have a route for Mr. Spelson, yet Mr. Spelson had taken the "pouch" (truck papers) for number 10 and left to inspect it even after being told not too. Brian told Ms. Chase that Mr. Spelson had not followed directions and had become disruptive. Brian had informed him that he would take whichever vehicle was assigned. Ms. Chase spoke with Mr. Spelson privately, in the board room. She explained the dispatcher was a supervisor. She testified that Mr. Spelson "quite quickly" became irate and said Brian was not a supervisor and he would not take instructions from him. Mr. Spelson repeated several times that he would never take instructions from Brian who he felt was not "equipped" to be a supervisor. Mr. Spelson became quite loud and irritated making derogatory remarks about United and clients. Ms. Chase testified that Mr. Spelson said nothing about being sent out in an unsafe vehicle. Mr. Spelson testified that Ms. Chase never told him to do what Brian said. Mr. Rennels testified that when he arrived at United that day, at 8:15 AM, he heard a loud male voice from the conference room. Ms. Chase testified she left the room and brought Mr. Rennels in, after discussing her (personnel) options with him. Mr. Spelson again became very loud. Ms. Chase referred to past concerns she had. Although in his eight years with United/PML no one had been fired for gross insubordination, Mr. Rennels believed it was appropriate because of the nature of the argument and loudness. Although Mr. Rennels was unaware of Mr. Spelson's DVCRs, he was familiar with the Distinctive Wine matter, the late deliveries, and phone charger matters.

After leaving the board room, Ms. Chase and Mr. Rennels telephoned Mr. Westrom explaining what had occurred and recommended termination. Ms. Chase and Mr. Rennels advised him that Mr. Spelson's behavior was "serious and egregious." Mr. Westrom, who also had his own concerns about Mr. Spelson, agreed. Mr. Rennels contacted PML which gave the "go-ahead" for termination. They returned to Mr. Spelson and informed him he was terminated for not following supervisory instructions. She testified that Mr. Spelson wanted to discuss issues he had with United, but she told him she did not want to hear his concerns. Mr. Rennels testified that Ms. Chase told Mr. Spelson that he was an "at will" employee, who had been there a short time and that "it would not work out." Ms. Chase testified that she was unaware of

Mr. Spelson's DVCRs and that they had nothing to do with the matter. Moreover, Mr. Spelson never said anything about his personal safety or fear the dispatcher was going to assign him a defective truck. Ms. Chase does not ever see the DVCRs. Mr. Rennels confirmed that Mr. Spelson's complaints about equipment were not a consideration in the termination. Mr. Rennels ordered Mr. Spelson to leave immediately; while Ms. Chase escorted him out he continued to argue with her. Mr. Rennels prepared a memorandum, on July 5, 2007, memorializing the events. (RX 6). On July 5, 2007, Mr. Rennels sent Mr. Spelson a letter confirming the earlier discussion terminating him for gross insubordination toward the dispatcher and Ms. Chase. (RX 5). He also prepared a chronology of events involving Mr. Spelson which was admitted as redacted. (RX 7).

Mr. Westrom had been contacted earlier by the Rick Simek, Distinctive Wines operations director, a customer for whom United made deliveries, that the latter's customer, a country club, had complained about Mr. Spelson, and that he no longer wanted him assigned to Distinctive Wine's routes. The country club complained that Mr. Spelson was found in an upstairs, banquet room area of the club in which he was not authorized. Mr. Westrom spoke to Mr. Spelson who related he had just been "curious" when found away from the loading dock area. Spelson had been hired primarily to serve the Distinctive Wines' route so some reassignments had to be made. Mr. Westrom did not consider this conversation to be "discipline." Although Mr. Spelson suggested that Rick Simek had been upset with him over some comments he had made about a bad (loading) dock plate, I do not find this testimony credible. At the hearing, Mr. Spelson denied having gone to any area away from the pick-up area. I do not find that testimony credible in view of contrary testimony by Mr. Westrom and Ms. Chase.

In conclusion, Mr. Spelson had made a number of "safety" complaints, that is, reports concerning necessary repairs to United Express' trucks, some of which were legitimate complaints. The reason he was terminated was totally unrelated to his comments concerning the condition of United's trucks. United had more trucks than drivers, so there would be no reason to send an unsafe vehicle out nor do I find that United would have done so. He was terminated explicitly for his gross "insubordination" viewed in light of his other non-protected activities, i.e., the Distinctive Wines episode, not keeping his radio on, misdirection and tardiness on a delivery. United Express had the normal vehicle defects one would expect with a fleet of vehicles, but had them regularly and timely inspected and repaired. It is established that the gross insubordination was the primary reason for his termination.

Company policy advised employees that insubordination could result in termination. Under the circumstances, Mr. Westrom cannot be reasonably criticized for exercising his prerogative to terminate Mr. Spelson. It is clear Mr. Spelson could no longer fit in.

B. STAA Violations -- Overview

A complainant may recover under the Act under three circumstances:

First, by demonstrating that he was subject to an adverse employment action because he has filed a complaint alleging violations of safety regulations. 49 U.S.C. § 31105 (a)(1)(A). This provision of the Act provides specifically and in pertinent part:

> (a) Prohibitions. -- (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because --
>
> > (A) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, . . .

The U.S. Department of Labor ("DOL") interprets this provision to include internal complaints from an employee to an employer. DOL's interpretation that the statute includes internal complaints has been found "eminently reasonable." *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12 (1st Cir. 1998)(case below 95-STA-34). The Circuit Court of Appeals has stated internal communications, particularly if oral, must be sufficient to give notice that a complaint is being filed and thus that the activity is protected. There is a point at which an employee's concerns and comments are too generalized and informal to constitute "complaints" that are "filed" with an employer within the meaning of the STAA. Id.

Second, by demonstrating that he was subject to an adverse employment action for refusing to operate a vehicle "because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." 49 U.S.C. § 31105(a)(1)(B)(i).

In such a case, the complainant must prove that an actual violation of a regulation, standard, or order would have occurred if he or she actually operated the vehicle. *Brunner v. Dunn's Tree Service*, 1994-STA-55 (Sec'y Aug. 4, 1995). However, protection is not dependent upon actually proving a violation. *Yellow Freight System v. Martin*, 954 F.2d 353, 356-357 (6th Cir. 1992).

Third, by showing that he was subject to an adverse employment action for refusing to operate a motor vehicle "because [he] has a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition." 49 U.S.C.§ 31105(a)(1)(B)(ii). To qualify for protection under this provision, a complainant must also "have sought from the employer, and been unable to obtain, correction of the unsafe condition." 49 U.S.C § 31105(a)(2).[3]

The burdens of proof under the Act have been adopted from the model articulated by the Supreme Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993). See *Anderson v. Jonick & Co.*,1993-STA-6 (Sec'y, September 29, 1993).

[3] Under 49 U.S.C.A. § 31105(a)(1)(B)(ii) a complainant must prove by a preponderance of the evidence that his or her alleged reasonable apprehension of serious injury due to the vehicle's unsafe condition, was objectively reasonable. *Brame v. Consolidated Freightways*, 1990-STA-20 (Sec'y, June 17, 1992) slip op. at 3 and *Brunner v. Dunn's Tree Service,* 1994-STA-55 (Sec'y, Aug. 4, 1995).

In *Byrd v. Consolidated Motor Freight*, 97-STA-9 at 4-5 (ARB May 5, 1998), the Administrative Review Board (ARB), summarized the burdens of proof and production in STAA whistleblower cases:

> A complainant initially may show that a protected activity likely motivated the adverse action. *Shannon v. Consolidated Freightways*, Case No. 96-STA-15, Final Dec. and Ord., Apr. 15, 1998, slip op. at 5-6. A complainant meets this burden by proving (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action, and (4) the existence of a "causal link" or "nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Shannon*, slip op. at 6; *Kahn v. United States Sec'y of Labor*, 64 F.3d 261, 277 (7th Cir. 1995).[4] A respondent may rebut this prima facie showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).

In a footnote to the above paragraph, the ARB provided further explanation on this last phase of the adjudication process:

> Although the "pretext" analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant, throughout the proceeding. Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by the prima facie case, the inference "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question." *St. Mary's Honor Center*, 509 U.S. at 510-511. See *Carroll v. United States Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996) (whether the complainant previously established a prima facie case becomes irrelevant once the respondent has produced evidence of a legitimate nondiscriminatory reason for the adverse action).

Once the complainant satisfies these four elements, a rebuttable presumption of discrimination arises, and the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse action. The burden shifting to the employer at that point is only to articulate a legitimate, nondiscriminatory, reason for the adverse action. The employer's burden at this point is one of production, not of proof.

With only one exception, the burden always remains with the claimant to establish the elements of his case: (1) protected activity; (2) a causal nexus between the protected activity and the adverse action; and (3) in response to employer's evidence of an allegedly legitimate reason for its action, evidence of pretext.[5]

---

[4] If other factors are present supporting discipline, then timing alone may not be sufficient to establish the necessary causal link. *Moon*, 836 F.2d at 229-230.

[5] In *Moon v. Transport Drivers*, 836 F.2d 226 (6th Cir. 1987), the court noted the addition of a fourth factor, i.e., that

The one exception to the claimant's burden of proof arises under the "dual motive" analysis: once the evidence shows that the proffered reason is not legitimate, and that the discharge was motivated at least in part by retaliation for protected activity, then the employer must establish by a preponderance of the evidence that it would have discharged the complainant independently of his protected activity. *Faust v. Chemical Leaman Tank Lines*, 93-STA-15 (Sec'y, April 2, 1996); *Moravec v. HC & M Transportation*, 90-STA-44 (Sec'y, January 6, 1992), slip op. at 12, n. 7.

Spelson alleged violations of both the complaint provision at 49 U.S.C. § 31105(a)(1)(A), and the refusal to drive provisions at § 31105(a)(1)(B). I will examine the complaint provision first.

C. The Complaint Provisions

Spelson complained, either in writing or verbally, to company superiors, limited defects on assigned trucks some of which could relate to violations of federal trucking regulations. Spelson contends that he communicated his safety concerns to United Express through daily pre-trip inspections, DVCRs, and through verbal statements regarding truck maintenance requests.

Under the STAA, an employee's complaint need only be "related" to a safety violation to be protected. Internal complaints to supervisory employees that are related to a violation of a commercial motor vehicle safety regulation are protected under the STAA. *Moravec v. HC & M Transportation, Inc*., 1990-STA-44 (Sec'y July 11, 1991). Spelson made the various communications to supervisors because he had a reasonable belief that such defects were a safety hazard. As such, Spelson's written and verbal notifications to his supervisor of truck defects are eligible for protection under the STAA. The daily duty of every driver to inspect their truck constitutes a "safety-related" complaint. A communication by an employee to a supervisor, albeit part of their job duties, that a truck has a mechanical defect that would inhibit safety if the vehicle is operated is a safety complaint subject to protection under the STAA. See *Schulman v. Clean Harbors Envtl. Servs., Inc*., 1998-STA-24 (ARB Oct. 18, 1999) (Vehicle inspection reports filed by the complainant as part of his daily job duties constituted protected activity under the complaint clause).

Thus, I find that at least some of Spelson's complaints constituted "protected activity" under the STAA. *See Dutkiewicz v. Clean Harbors Environmental Services*,1995-STA-34 (Sec'y Aug. 8, 1997) (internal complaint to superiors is a protected activity under the STAA); *accord, Stiles v. J.B. Hunt Transportation*, 1992-STA-34 (Sec'y Sept. 24, 1993) and cases there cited; and, *Pillow v. Bechtel Construction*,1987-ERA-35 (Sec'y July 19 1993) (under analogous employee protection provision of the Energy Reorganization Act, contacting a union representative about a safety violation is protected), *aff'd sub nom*. *Bechtel Construction Co. v. Secretary of Labor*, 98 F.3d 1351 (11th Cir. 1996).[6] Additionally, the complainant is not

---

the employer knew of the plaintiff's protected activity.

[6] Under the STAA, a safety related complaint to any supervisor, no matter where that supervisor falls in the chain of command, can be protected activity. *See, e.g., Hufstetler v. Roadway Express*, 1985-STA-8 (Sec'y, Aug. 21, 1986), *aff'd Roadway Express v. Brock*, 830 F.2d 179 (11th Cir. 1987).

required to prove a reasonable apprehension of injury, an actual violation or that the complaint has merit. *Pittman v. Goggin Truck Line, Inc*., 1996-STA-25 (ARB Sept. 23, 1997); *Lajoie v. Environmental Management Systems, Inc*., 1990-STA-31 (Sec'y Oct. 27, 1992); *Barr v. ACW Truck Lines, Inc.*, 1991-STA-42 (Sec'y Apr. 22, 1992); *Yellow Freight Systems, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992).

D. Refusal to Drive

A refusal to drive is protected under two STAA provisions. The first provision, 49 U.S.C.A. § 31105(a)(1)(B)(i), requires that a complainant "show that the operation [of a motor vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive -- a mere good faith belief in a violation does not suffice." *Yellow Freight Systems v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993).

The second refusal to drive provision focuses on whether a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury if he drove. 49 U.S.C.A. § 31105(a)(1)(B)(ii); *Cortes v. Lucky Stores, Inc*., 1996-STA-30 (ARB Feb. 27, 1998).

An employee must actually refuse to operate a vehicle to be protected under the refusal to drive provision of the STAA. *Williams v. CMS Transportation Services, Inc*., 1994-STA-5 (Sec'y Oct. 25, 1995). A refusal to drive must be accompanied by a safety basis for employee's refusal to drive. *See, e.g., Smith v. Specialized Transportation Services*, 1991-STA-22 (Sec'y Apr. 20, 1992)(Complainant's statement that she was "too stressed out" to drive during a conversation with her supervisor did not establish that she conveyed to the supervisor that her refusal to drive was because she was unable to do so safely or without danger of injury); *Mace v. Ona Delivery Systems*, Inc., 1991-STA-10 (Sec'y Jan. 27, 1992) (The complainant could not prevail on his STAA complaint where the record established that his complaint to respondent centered on extra job assignments rather than on perceived safety violations. Because complainant failed to communicate safety defects as a basis for his refusal to work, Respondent was not aware of any vehicle defect and was not motivated by such in discharging complainant).

Mr. Spelson has not established any refusal to drive. Although he noted vehicle defects, such as a broken lift gate, he nevertheless continued to drive the trucks. On July 5, 2007, he admittedly had not been assigned any work nor had he been assigned a vehicle by the dispatcher as United's work protocol dictated. Moreover, I credit Mr. Westrom and Lentz's testimony that the trucks did not have "broken" mirrors over Mr. Spelson's testimony. Nor did Mr. Spelson report a hazardous safety or security condition which he asked the employer to remedy.

Based on the foregoing evidence, Complainant did not establish that a genuine violation of a federal safety regulation would have occurred.

Thus, I find Mr. Spelson did not establish protected activity under the refusal to drive provision.

E. Termination or Discharge

Mr. Spelson testified that he had brought safety matters to United Express Systems' attention via pre-trip inspection reports and DVCRs. The parties agree that Spelson was terminated on July 5, 2007.[7]

The complainant has the burden of proof to show that retaliation for protected activity was a reason for the termination. As part of this burden, the complainant must show that the respondent had knowledge of complainant's protected activity at the time of employer's adverse action. *See Homen v. Nationwide Trucking, Inc*., 1993-STA-45 (Sec'y Feb. 10, 1994); *Stiles v. J.B. Hunt Transportation, Inc*., 1992-STA-34 (Sec'y Sept. 24, 1993). If the complainant meets such burden, the respondent has the burden to prove a legitimate, nondiscriminatory reason for termination. A complainant may show that the employer's reason for termination is pretext by evidence that the employer's proffered reasons have no basis in fact, that the proffered reasons did not actually motivate his discharge, or that the reasons were insufficient to motivate the discharge. *Manzer v. Diamond Shamrock Chemical Company*, 29 F.3d 1978 (6th Cir. 1994).

In establishing his prima facie case, Mr. Spelson need only raise the inference that his engaging in protected activities caused his termination. The proximity in time between protected conduct and adverse action alone may be sufficient to establish the element of causation for purposes of a prima facie case. *See, e.g., Stiles v. J.B. Hunt Transportation, Inc*., 1992-STA-34 (Sec'y Sept. 24, 1993) (Complainant discharged within one week of raising safety concerns sufficient for inference of causation); *Toland v. Werner Enterprises*, 1993-STA-22 (Sec'y Nov. 16, 1993)(Where complainant was discharged the same day he raised safety complaints, the secretary found that complainant raised the inference that he was terminated because he engaged in protected activity); *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989)(Temporal proximity is sufficient as a matter of law to establish the final element in a prima facie case of retaliatory discharge); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987)(Temporal proximity alone did not support an inference of causation where there was compelling evidence that the employer encouraged safety complaints).

I find that Spelson has not established the inference that his engaging in protected activity caused his termination. There is ample evidence that United Express actively encouraged safety complaints. Moreover, as noted above, Mr. Westrom testified that, as a former fireman and owner, safety is his "ultimate" concern. *Moon*, 836 F.2d 226. Thus, Spelson has not established his prima facie case. He engaged in protected activity under the complaint provision of the STAA. He was terminated. The proximity in time between his complaint and termination fails to

[7] Whether an employee has been discharged depends on the reasonable inferences that the employee could draw from the statements or conduct of the employer. *Pennypower Shopping News v. N.L.R.B.*, 726 F.2d 626, 629 (10th Cir. 1984). As the Court in *Pennypower* noted:

> The fact that there is no formal discharge is immaterial if the words or conduct of employer would logically lead an employee to believe his tenure had been terminated. . . .[S]ince the company created the ambiguity which reasonably caused the employees to believe they were discharged, or at least to believe their employment status was questionable due to their strike activity, the burden of the ambiguity must fall on the company.

Pennypower Shopping News v. N.L.R.B., 726 F.2d at 630l.

raise the inference of a causal link between his protected activity and the adverse action of the employer. Neither Ms. Chase nor Mr. Rennels was familiar with Mr. Spelson's DVCRs or vehicle inspections, on July 5, 2007, when they recommended his discharge for insubordination. Mr. Westrom, who along with PML, terminated Spelson was only aware of some of his complaints, i.e., the defective lift gate and some of which he did not agree with, i.e., broken mirrors. There was no evidence that Mr. Westrom routinely reviewed drivers' vehicle inspection reports or DVCRs. But, Mr. Westrom had knowledge of some of Spelson's protected activity at the time he terminated him. As such, looked at in a light most favorable to Mr. Spelson, United Express would have had the burden to prove a legitimate, nondiscriminatory, reason for Spelson's termination had Mr. Spelson established a prima facie case.

Respondent asserts that Spelson was terminated for gross insubordination. Even after Ms. Chase's instructions the latter repeatedly stated he would not follow the dispatcher's direction, was argumentative with both Ms. Chase and the dispatcher, and was saying unspecified "uncomfortable" things about the company and its clients. Complainant asserts that such explanation for terminating him shows United's irritation at his defect reporting.[8] I do not find that to be the case.

The evidence is clear that Mr. Westrom had no intention of terminating Mr. Spelson until the events of July 5, 2007 were reported to him. In fact, as late as the June 29, 2007 late-delivery incident he was considering yet more training for Mr. Spelson. Moreover, he was not aware of any safety complaints or vehicle defects relating to the July 5th termination.

Under *Kenneway*, one might argue that Mr. Spelson was terminated for making safety complaints and that arguing with his dispatcher and supervisor does not remove him from the protections of the STAA. In *Kenneway*, the complainant refused to accept a driving assignment. Thereafter, a conversation ensued and complainant was discharged. Respondent argued that the complainant was discharged for vulgar and abusive language. The Secretary agreed with the ALJ's conclusion that the complainant's language and conduct during the conversation did not remove him from protection afforded under the STAA. The *Kenneway* decision relied on NLRB Fifth Circuit cases for the fact that courts have recognized the use of intemperate-language associated with some forms of statutorily protected activities due to the adversarial nature of these activities. The Secretary applied the following balancing test:

> The right to engage in statutorily-protected activity permits some leeway for impulsive behavior, which is balanced against the employer's right to maintain order and respect in its business by correcting insubordinate acts. A key inquiry is whether the employee has upset the balance that must be maintained between protected activity and shop discipline.

Kenneway v. Matlock, Inc., 1988-STA-20 (Sec'y June 15, 1989). I find that the facts in *Kenneway* and the facts of the current case are clearly distinguishable. And, as such, the

[8] When a complainant engages in spontaneous intemperate conduct privately communicated over the telephone, the intemperate conduct does not remove the statutory protection nor provide the respondent with a legitimate, nondiscriminatory reason for adverse action. *See Kenneway v. Matlack*, 1988-STA-20 (Sec'y June 15, 1989); *Lajoie v. Environmental Management Systems, Inc.*, 1990-STA-31 (Sec'y Oct. 27, 1992).

Kenneway balancing test does not apply to the case at hand. In *Kenneway*, during one conversation, the respondent instructed the complaint to perform an assignment which would have violated the STAA, the complainant refused to drive, an argument occurred and complainant was discharged. In the current case, Spelson complained about his relationship with the dispatcher and the latter's authority over him. Spelson had neither a job assigned nor a truck assigned and no one directed him to drive. Mr. Westrom's conclusion that Spelson's actions were a sign of insubordination and a legitimate, non-discriminatory reason for terminating his employment were well-founded. *Auman v. Inter Coastal Trucking*, 1991-STA-32 (Sec'y July 24, 1992)(The respondent met his burden of production to present evidence of a legitimate, nondiscriminatory reason for firing the complainant where its manager testified that he fired complainant because of complainant's expressed distrust of the company and its personnel). Even if an employee engages in protected activity, an employer may discipline an employee for insubordination. *Clement v. Milwaukee Transport Services, Inc*., 2001-STA-6 (ARB Aug. 29, 2003).

In addition to the different facts, in *Harrison v. Roadway Express, Inc*., 1999-STA-37 (ARB Dec. 31, 2002) (*aff'd* 2nd Circuit Nov. 30, 2004), the Administrative Review Board determined that "[T]he ALJ inappropriately applied the labor relations standard cited in *Kenneway* to determine whether *Harrison* was entitled to the protection offered by § 31105(a)(1)(A), the 'filed a complaint' section of the Act. *Kenneway* arose under § 2305(b) (now § 31105(a)(1)(B)), the 'refusing to operate a vehicle' section." As noted above, Spelson engaged in protected activity under the "complaint" section of the STAA and did not establish a "refusal to drive". Thus, following *Harrison*, the *Kenneway* decision does not apply to the current case.

In analyzing whether the articulated reasons for the discharge are credible, I find there is evidence demonstrating that Spelson not a model employee. He had numerous difficulties, i.e., the Distinctive Wines matter, the misdirection and tardy delivery of a time-sensitive load, not keeping his radio/phone on, and inexplicable overly-long hours. I find no discriminatory intent in Spelson's termination. Mr. Spelson was terminated for legitimate, nondiscriminatory reasons, namely gross insubordination. *See Schulman v. Clean Harbors Envtl. Servs., Inc*., 1998-STA-24 (ARB Oct. 18, 1999) (Complainant, although he participated in protected activity, was legitimately terminated for insubordination after making it clear to his immediate supervisor, by the use of foul language, that he would not be managed).

When there are both legitimate and discriminatory reasons for an adverse action, the dual motive analysis applies. *Spearman v. Roadway Express*, 1992-STA-1 (Sec'y Jun 30, 1993) and *Yellow Freight System v. Reich*, 27 F.3d 1133, 1140 (6th Cir.1994). Under the dual motive analysis, the burden shifts to the respondent to show that it would have taken the same action against the complainant even in the absence of protected activities. *Asst. Sec. and Chapman v. T. O. Haas Tire Co*., 1994-STA-2 (Sec'y Aug. 3, 1994), *appeal dismissed*, No. 94-3334 (8th Cir. Nov. 1, 1994).

As such, it is clear that even with the limited and some legitimate vehicle defect reports, Mr. Spelson would have been terminated for gross insubordination and the derelictions set forth above. As the Sixth Circuit has observed, "The relevant inquiry is the employer's perception of

his justification for the firing." *Moon v. Transport Drivers*, 836 F.2d 226, 230 (6th Cir.1987). I find that United Express Systems has established that even absent any protected safety complaints or protected refusals to drive on Spelson's part, the company legitimately would have fired him for gross insubordination. In this case, United Express Systems established a credible explanation for discharging Spelson. I find that Mr. Spelson did not establish, by a preponderance of the evidence, that the reasons given for his discharge were pretextual.

VII. CONCLUSIONS

Some of Mr. Spelson's vehicle defect complaints at United Express Systems constituted protected activity. However, United Express Systems (and PML) neither disciplined Spelson nor discharged him because of his vehicle defect complaints. United Express Systems/PML terminated Mr. Spelson for legitimate, nondiscriminatory, reasons.

Mr. Spelson was given notice of discharge on July 5, 2007; the discharge was effective on July 5, 2007. The discharge was not based on his complaints and United Express Systems successfully established that it would have discharged Spelson even in the absence of his protected activities. Mr. Spelson's termination was not causally related to any protected activity under the STAA, and, thus, PML/United Express' adverse actions against Complainant do not constitute a violation of § 405 of the STAA. Mr. Spelson did not establish any refusal to drive. Moreover, Mr. Spelson failed to establish that United Express' reason for his termination was a pretext to discriminate against him.

RECOMMENDED ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, Complainant's relief requested is hereby DENIED. It is hereby recommended that the complaint filed by PETER T. SPELSON be dismissed.

A

RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.